Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 79-1008

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ILLINOIS,

Petitioner,

VS.

DAVID BISHOP,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIFTH DISTRICT

Respectfully submitted,

T. R. MURPHY, JR.,
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Attorney for Respondent.

CITATIONS

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The Respondent, David Bishop, through his attorney, T. R. Murphy, Jr. of Law Offices of Watson and Murphy, respectfully requests the Honorable Court deny the Petition of the State of Illinois For a Writ of Certiorari to the Appellate Court of Illinois, Fifth District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, is reported at 71 Ill. App. 3d 52, 388 N.E. 2d 1144, 27 Ill. Dec. 181 (5th Dist. 1979).

The order of the Supreme Court of Illinois denying the State's petition for leave to appeal was entered October 1, 1979. This order was not reported.

JURISDICTION

Jurisdiction is asserted by the State of Illinois under 28 U.S.C. § 1257 (3). The State contends that the relevant time limitations have been complied with and that the Court has jurisdiction because of the respondent's assertion of rights under the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to hear this case due to the fact that the opinions below were based upon constitutional and statutory provisions of the State of Illinois, as well as on provisions of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED
UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

CONSTITUTION OF ILLINOIS, 1970
ARTICLE I, Section 6

The People shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable search, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

STATUTES INVOLVED

Illinois Criminal Code, paragraph 108-7 (Ill. Rev. Stat., 1977, Ch. 38, par. 108-7).

The warrant shall command the person directed to execute the same to search the place or person particularly described in the warrant and to seize the instruments, articles or things particularly described in the warrant.

STATEMENT OF THE CASE

The statement of the case contained in Petitioner's brief appears to be correct in the particulars therein set forth.

REASONS FOR DISALLOWANCE OF WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CASE BECAUSE THE OPINIONS OF THE ILLINOIS COURTS BELOW WERE BASED UPON CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF ILLINOIS AS WELL AS ON SIMILAR PROVISIONS OF THE UNITED STATES CONSTITUTION.

The jurisdictional requirements of 28 U.S.C. § 1257 (3) have long been interpreted by this Court as not being met where the judgment of the State Court in question rests upon adequate and independent state grounds. The logic behind this limitation is well expressed by Justice Jackson speaking for the Court in *Herb* v. *Pitcairn*, 324 U.S., 117, 125-126, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945) as follows:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power to correct wrong judgments, not to revise opinions. We are not permitted to render advisory opinion, and if the judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory

opinion.

An examination of the opinion of the Appellate Court of Illinois, Fifth District, reveals that it was not based solely on the federal constitutional protections but was also founded on independent and adequate state statute and constitutional provisions.

This principle was applied by this Court in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965), wherein a Petition for Writ of Certiorari was dismissed as improvidently granted. In *Jankovich*, the Court cited *Fox Film Corp.* v. *Miller*, 296 U.S. 207, 210, and *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281, for the proposition that "...the settled rule that where the judgment of the state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." In *Jankovich*, the opinion of the Indiana Supreme Court in question was based upon the Indiana Constitution as well as the 14th Amendment to the U. S. Constitution. Since the state ground was at least an equal ground of the decision, the Writ was dismissed, even though the Indiana Supreme Court had not separately analyzed the federal and non-federal grounds. Applying the principles of *Jankovich* to the instant case requires that the Court find it has no jurisdiction because of the reliance by the courts below on Illinois law.

A recent case decided by this Court deals with a situation in which the rights of a defendant in a criminal prosecution are protected by state as well as federal provisions. In *Oregon* v. *Hass*, 420 U.S. 714, 719 95 S. Ct. 1215, 43 L. Ed. 2d 570, 575, (1975), Justice Blackman, speaking for the majority in a footnote, cites with approval an Oregon case dealing with search and seizure in which the Oregon court states that it could interpret

its constitution as being more restrictive than the Fourth Amendment to the United States Constitution, *State* v. *Florance*, - - - Ore. - - -, 527 P. 2d 1202, 1208 (1974). Justice Blackman therein comments that the statement of the Oregon court is, of course, good law. If that statement of the Justice is indeed good law, then this Court has no alternative but to decide that it lacks jurisdiction to pass upon the interpretation of Illinois law by Illinois courts.

It is also worthy of note, that unlike *Hass*, in which this Court found no reliance on independent state grounds by the Oregon court, the decision in the instant case specifically cites the relevant Illinois law.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court enter an Order denying its Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Fifth District.

Respectfully submitted,

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